

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

-----oo0oo-----

CALIFORNIA STATE OUTDOOR
ADVERTISING ASSOCIATION, INC.,
a California corporation, et
al.,

Plaintiffs,

v.

STATE OF CALIFORNIA,
DEPARTMENT OF TRANSPORTATION,
WILL KEMPTON, in his official
capacity as Director,
CALIFORNIA DEPARTMENT OF
TRANSPORTATION, and DOES 1-50
inclusive,

Defendants.

NO. CIV. S-05-0599 FCD/DAD

MEMORANDUM AND ORDER
(SECOND CORRECTED ORDER) *

-----oo0oo-----

This matter is before the court on a motion for summary
judgment and a motion for attorney fees filed by plaintiffs,
California Outdoor Advertising Association, Inc., and its
members, Arcturus Outdoor Advertising, Bulletin Displays, LLC,
Clear Channel Outdoor, Inc., Fairway Outdoor Advertising, Inc.,

1 Edwards Outdoor Signs, General Outdoor Advertising, Inc., James
2 N. Hoff doing business as Hoff Outdoor Advertising, Hunter Media,
3 Lamar Central Outdoor, Inc., J. R. Zukin Corporation doing
4 business as Meadow Outdoor Advertising, Sun Outdoor Advertising,
5 Stott Outdoor Advertising, Titan Advertising, United Outdoor
6 Advertising, Van Wagner Communications, LLC, Van Wagner/Goodman,
7 LLC, and Viacom Outdoor, Inc. (collectively "CSOAA"). Defendants
8 State of California Department of Transportation and Will
9 Kempton, Director of the California Department of Transportation
10 (collectively "Caltrans") oppose the motions. The court held a
11 hearing on the motions February 10, 2006.

12 After considering the memoranda filed by the parties and
13 arguments made by counsel at the hearing, and for the reasons
14 stated herein, plaintiffs' motion for summary judgment is
15 GRANTED, and plaintiffs' motion for attorneys' fees is GRANTED.

16 **BACKGROUND**

17 Caltrans, a department of the State of California, regulates
18 outdoor advertising pursuant to the Outdoor Advertising Act,
19 California Business & Professions Code § 5200 et seq. ("OAA") and
20 regulations promulgated by Caltrans pursuant to the OAA. (Defs.'
21 Response to Pls.' Statement of Undisp. Facts ("RUF") ¶ 1). The
22 OAA requires that any person operating an outdoor advertising
23 display in California referred to herein as "sign" or
24 "billboard") obtain a permit ("Billboard permit") issued by the
25 director of Caltrans or his authorized agent, which must be
26 renewed every five years. Cal Bus. & Prof. Code §§ 5350,
27 5360(a); RUF ¶ 3. Prior to January 1, 2003, the fee for
28 obtaining a Billboard permit was set by statute, California

1 Business and Professions Code section 5485(a), at \$20.00 per year
2 for each billboard. (RUF ¶ 4).

3 Effective January 1, 2003, the Legislature amended section
4 5485(a), which now provides that the Director of Caltrans shall
5 set the Billboard permit fee:

6 (a)(1) The annual permit fee for each advertising
display shall be set by the director.

7 (2) The fee shall not exceed the amount reasonably
8 necessary to recover the cost of providing the service
9 or enforcing the regulations for which the fee is
charged, but in no event shall the fee exceed one
10 hundred dollars (\$100). This maximum fee shall be
increased in the 2007-08 fiscal year and in the 2012-13
fiscal year by an amount equal to the increase in the
California Consumer Price Index.

11 (3) The fee may reflect the department's average cost,
12 including the indirect costs, of providing the service
or enforcing the regulations.

13 Cal. Bus. & Prof. Code § 5485(a).

14 On or about June 2, 2003, Caltrans announced a new annual
15 permit renewal fee of \$92.00, which Caltrans indicated it
16 promulgated pursuant to newly-amended section 5485(a). (RUF ¶
17 6). At or around the same time, Caltrans notified permit holders
18 that they were required to pay within thirty days¹ an additional
19 \$72.00 per billboard for their 2003 permits or the permits would
20 be revoked pursuant to California Business and Professions Code §
21 5463.² (RUF ¶ 6). In setting the new Billboard permit fee,
22

23 ¹ According to Caltrans, it extended the thirty-day
24 period to sixty days on July 17, 2003. (RUF ¶ 6).

25 ² California Business and Professions Code § 5463
26 provides in relevant part: "The director may revoke any license
27 or permit for the failure to comply with this chapter and may
remove and destroy any advertising display placed or maintained
in violation of this chapter after 30 days written notice is
forwarded by mail to the permitholder at his or her last known
address. If no permit has been issued, a copy of the notice shall
28 be forwarded by mail to the display owner, property owner, or

1 Caltrans did not follow the rulemaking provisions of the
2 Administrative Procedures Act, California Government Code section
3 11340, et seq. ("APA").

4 Plaintiffs filed their original complaint with the Los
5 Angeles County Superior Court.³ On November 29, 2004, plaintiffs
6 filed a First Amended Complaint asserting four claims: (1)
7 violation of the APA; (2) violation of California Business and
8 Professions code section 5485(a); (3) violation of Article I,
9 §2(a) of the California Constitution protecting liberty of
10 speech; and (4) against defendant Kempton only, a claim under 42
11 U.S.C. § 1983 for violation of plaintiff's First Amendment
12 rights.

13 On January 5, 2005, defendants removed the action to the
14 United States District Court for the Central District of
15 California on the basis of the First Amendment claim against
16 defendant Kempton. Defendants subsequently filed a motion for
17 change of venue which was granted by order dated March 14, 2005.
18 The case was transferred to this court on March 24, 2005.

19 On June 7, 2005 defendants filed a motion for partial
20 summary judgment. On July 12, 2005 plaintiffs filed a cross
21 motion for partial summary judgment as to the validity of the
22 permit fee. On August 29, 2005, the court granted plaintiff's
23 motion on the grounds that the APA applied to defendants' setting
24 of the permit fee and Caltrans failed to comply with the APA
25 procedure.

26 _____
27 advertiser at his or her last known address."

28 ³ The court cannot locate in the file the date plaintiffs
filed the original complaint.

On November 14, 2005, plaintiffs filed a motion for summary judgment, seeking (1) declaratory relief that the permit fee is void; (2) an injunction prohibiting Caltrans from taking any action to enforce the fee and from withholding any permit renewal or other regulatory action on the grounds of non-payment of the fee; and (3) refunds to plaintiffs for permit fees paid. On November 30, 2005, the parties submitted a stipulation to the court. The parties agreed to continue the hearing on plaintiff's motion for summary judgment. The parties also agreed that defendant Caltrans would not collect 2006 permit renewal fees until the fee was set through the APA procedure and the defendants would be permanently enjoined from imposing any penalties upon plaintiffs for failure to pay the 2006 permit renewal fees before December 31, 2005. On December 1, 2005, the court entered an order based upon these stipulations. On January 3, 2006, plaintiffs filed a motion for award of attorneys' fees. Defendants subsequently filed oppositions to both of plaintiffs' motions.

STANDARD

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Under this standard, an issue is "genuine" if there is sufficient evidence for a reasonable jury to find for the nonmoving party and a fact is "material" when it may affect the outcome of the case under the substantive law that provides the claim or defense. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). The

determination is made based solely upon admissible evidence. Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002).

Furthermore, the court must view inferences made from the underlying facts in the light most favorable to the nonmoving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970).

The moving party has the initial burden to demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party is without the ultimate burden of persuasion at trial, it may either produce evidence negating an essential element of the opposing party's claim, or demonstrate that the nonmoving party does not have enough evidence to carry its ultimate burden of persuasion at trial. Nissan Fire & Marine Insurance Co. v. Fritz Companies, Inc., 210 F.3d 1099, 1106 (9th Cir. 2000). If the moving party meets this initial requirement, the burden then shifts to the opposing party to go beyond the pleadings and set forth specific facts that establish a genuine issue of material fact remains for trial. Matsushita Elec. Indust. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-87 (1986). Summary judgment should not be granted where "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson, 477 U.S. at 250.

ANALYSIS

A. Declaratory Relief

Plaintiffs seek a judicial declaration that the permit renewal fee imposed without compliance with APA procedures is void. "To give weight to an improperly adopted regulation . . . would permit an agency to flout the APA by penalizing those who

1 were entitled to notice and an opportunity to be heard but
2 received neither." Tidewater Marine Western, Inc. v. Bradshaw,⁴
3 14 Cal. 4th 557, 577 (1996) (quoting Armistead v. State Personnel
4 Bd., 22 Cal. 3d 198, 204 (1978)). Therefore, "[f]ailure to
5 comply with the APA nullifies the rule." Kings Rehab. Ctr., Inc.
6 v. Premo, 69 Cal. App. 4th 215, 217 (1999) (citing Cal. Gov. Code
7 § 11350); see also Hillery v. Rushen, 720 F.2d 1132, 1134 (9th
8 Cir. 1983).

9 As discussed in the court's August 29, 2005 order,
10 defendants were required to comply with the APA in setting the
11 permit renewal fee. Defendants failed to comply with any APA
12 procedures in setting the \$92 fee. Therefore, the \$92 permit fee
13 set without compliance with APA procedures is void.

14 Defendants argue that declaratory relief is improper because
15 the time for this remedy has passed. However, the proper relief
16 for an individual seeking a determination of the validity of a
17 regulation is declaratory relief. Cal. Gov. Code § 11350 (West
18 2005). Because plaintiffs seek determination of the validity of
19 the permit fee, declaratory relief is the appropriate remedy and
20 the request for this type of relief is not untimely.

21 Defendants also argue that none of the public policy
22 concerns protected by the APA were violated by setting the fee
23 without compliance with APA procedures; rather, the legislative
24 intent to increase the permit renewal fee would be frustrated by

25
26 ⁴ Defendants argue that Tidewater is distinguishable from
27 this case because the regulations at issue in Tidewater were
28 "written interpretive policies" whereas the regulations in this
case were authorized by statute. However, these differences are
irrelevant. In both Tidewater and this case, defendants failed
to comply with the APA in adopting regulations.

1 declaring the fee void. Plaintiffs correctly point out, however,
2 that the relevant legislative intent is that set forth in §
3 11346(a) of the APA, which requires all state agencies to
4 regulate in compliance with the APA except where the Legislature
5 authorizes an express exemption. As set forth in the court's
6 August 29, 2005 order, no such exemption applies to the setting
7 of the permit renewal fee. Therefore, the purposes of the APA
8 would be frustrated by a failure to declare the fee invalid.

9 Plaintiffs' motion for declaratory relief is GRANTED. The
10 permit fee is void for failure to comply with the APA.

11 **B. Injunction Against Enforcement of the Fee**

12 Plaintiffs seek a permanent injunction, enjoining defendants
13 from future enforcement of the permit fees and from penalizing
14 plaintiffs in any way for non-payment of the fees. California
15 courts commonly grant both declaratory and injunctive relief in
16 cases brought under § 11350. Hillery, 720 F.2d at 1139.

17 California Government Code § 11340.5(a) prohibits a state agency
18 from enforcing or attempting to enforce a regulation not adopted
19 in compliance with the APA. Cal. Gov. Code § 11340.5 (West
20 2005). An injunction preventing enforcement of the fees or
21 penalties for non-payment of the fees would be consistent with
22 this prohibition.

23 Defendants argue that plaintiffs' request for injunctive
24 relief is moot because defendants have initiated APA rulemaking
25 procedures in setting the 2006 fee and because the parties
26 entered into a stipulated injunction entered by the court on
27 December 1, 2005. However, defendants have not completed the APA
28 procedure at this point. The court cannot speculate that

1 defendants will continue through the APA process, thereby making
2 plaintiffs' requested injunction moot. Further, the stipulated
3 injunction provides that defendants are permanently enjoined from
4 imposing any penalties upon plaintiffs for failure to pay the
5 2006 permit renewal fees before December 31, 2005. This is a
6 more limited injunction than that which plaintiff requests in
7 this motion. Plaintiffs request a permanent injunction
8 prohibiting any future enforcement of the invalid fees as well as
9 prohibiting the imposition of penalties for non-payment of the
10 invalid fees. Therefore, plaintiffs' request for an injunction
11 is not rendered moot by the more limited permanent injunction
12 stipulated to by the parties.

13 Plaintiffs are entitled to injunctive relief in order to
14 enforce the court's finding that the permit fee set without
15 compliance with the APA is void. As such, plaintiffs' request
16 for a permanent injunction prohibiting future enforcement of the
17 current, invalid permit renewal fee that was not enacted pursuant
18 to APA procedures, as well as penalties for failure to pay that
19 fee is GRANTED.

20 **C. Refund and Interest for Past Fees Paid**

21 Plaintiffs seek a refund in the amount of \$72 per permit for
22 the years 2003-2005, when the fee was set without compliance with
23 the APA. The plaintiffs seek the difference between the new fee
24 set, \$92 per permit, and the previous fee, \$20 per permit, plus
25 seven percent interest. Defendants oppose the refund of any
26 fees.

27 /////

28 /////

1 **1. Refund**

2 Plaintiffs argue that both due process and California state
3 case law⁵ support the refund of fees paid pursuant to an invalid
4 regulation. Plaintiffs analogize their case to cases concerning
5 refunds of a void tax, arguing that the rationale of those cases
6 is equally applicable to plaintiffs' circumstances. Exaction of
7 a tax constitutes a deprivation of property for which the State
8 must provide procedural safeguards against unlawful exactions in
9 order to satisfy the commands of the Due Process Clause.

10 McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Etc.,
11 496 U.S. 18, 36 (1990). California courts have held that where
12 taxes or fees have been illegally levied and payment is effected
13 by compulsion, the taxpayer is entitled to a refund. See Jordan
14 v. Dept. of Motor Vehicles, 75 Cal. App. 4th 449 (1999)
15 (affirming refund of unconstitutional smog impact fee to
16 plaintiffs who brought suit); Flynn v. City and County of San
17 Francisco, 18 Cal. 2d 210, 216 (1941); Vitale v. City of Los
18 Angeles, 13 Cal. App. 2d 704, 706 (1936); White v. State of
19 California, 110 Cal. App. 314, 315-16 (1930).

20 Involuntary payment of the tax is a prerequisite to recovery
21 of a refund. Flynn, 18 Cal. 2d at 216. In Flynn v. City and
22 _____

23 ⁵ Plaintiffs cite to decisions of California courts as an
24 independent ground for granting the refund. However, while many
25 of these cases do not explicitly reference the Due Process
26 clause, the analysis of the relevant facts and issues is similar
27 to a traditional Due Process analysis. Compare Flynn v. City and
28 County of San Francisco, 18 Cal. 2d 210 (1941) with McKesson
Corp. v. Div. of Alcoholic Beverages & Tobacco, Etc., 496 U.S.
18, 38-39 (1990). Both inquiries involve an inquiry into the
applicable predeprivation remedy, either for purpose of the
voluntariness component analyzed in state law cases or for the
adequacy of the procedure analyzed in due process cases.

1 County of San Francisco, the court held that the plaintiff was
2 entitled to a refund of an illegal license tax where the
3 plaintiff had a reasonable belief that payment of the license tax
4 was necessary to protect his business. 18 Ca. 2d at 217. The
5 court stated that the involuntary or voluntary character of a
6 payment "is to be determined from the terms of the ordinance
7 under which the taxes are imposed, the circumstances attendant
8 upon payment, and a consideration of the consequences which might
9 follow upon non-payment. Id. The Flynn court held that a refund
10 was warranted because the "motivating cause of the payments was
11 fear of infliction of the penalties," which included monetary
12 penalties for delinquencies, civil actions resulting in writs of
13 attachments, and criminal liability. Id. 216-17.

14 Plaintiffs assert that, like the plaintiff in Flynn, they
15 were coerced into making payments pursuant to an invalid
16 licensing system because of the potentially damaging
17 repercussions to their business interests that would result from
18 non-payment. Specifically, plaintiffs argue that the invalid fee
19 payments were coerced and, thus, involuntary due to the structure
20 of the regulations relating to permit acquisition and renewal.
21 California Business and Professions Code § 5350 requires that
22 plaintiffs possess a permit as a condition of placing billboard
23 areas near a major highway. Cal. Bus. & Prof. Code § 5350 (West
24 2005). Payment of the fee is required to renew such a permit. 4
25 C.C.R. § 2424(a). Failure to renew a permit is grounds for
26 revocation of the permit. 4 C.C.R. § 2443. Further, the
27 director may remove or destroy any advertising display if the
28 permit is not renewed. Cal. Bus. & Prof. Code § 5463. Finally,

1 any person who violates the permit requirement is guilty of a
2 misdemeanor. Cal. Bus. & Prof. Code § 5464. Because of the
3 monetary, civil, and criminal penalties accompanying non-payment
4 of the renewal fee, plaintiffs argue that the payment was not
5 voluntary.

6 As an initial matter, defendants argue that state tax cases
7 are not relevant to plaintiffs' claims. Defendants contend that
8 because the statute granting defendants authority to set a new
9 fee has not been held unconstitutional, the cases cited by
10 plaintiffs are inapplicable.⁶ There is no dispute that § 5485
11 granted defendants the authority to set a new permit renewal fee.
12 However, the court has held that the fee setting regulation
13 adopted pursuant to this statutory grant is void for failure to
14 comply with the ADA. Therefore, plaintiffs money was paid
15 pursuant to an invalid regulation. As such, plaintiffs' analogy
16 to state tax cases, where tax payers sought a refund for moneys
17 paid pursuant to illegal, unconstitutional, or void laws or
18 regulations, is relevant to plaintiffs' claims for a refund for
19 fees paid pursuant to an invalid regulation.

20 Defendants also argue that plaintiffs' payments were
21 voluntary because plaintiff had pre-deprivation remedies
22

23
24 ⁶ Defendants also contend that Flynn is inapplicable to
25 this case because the tax at issue in that case was a general
26 revenue tax as opposed to a specific regulatory fee. Defendants
27 neither provide authority nor offer explanation as to why the
28 purpose of an invalid tax or fee bears any relationship to
whether a refund is warranted. To the contrary, the court finds
that, regardless of what the tax or fee sought to fund or
accomplish, the relevant issue of concern is that payments were
made pursuant to an invalid statutory scheme and defendants have
been unjustly enriched.

1 available to them. At the relevant times in this case,⁷ § 2424
2 of the California Code of Regulations provides that “[u]pon
3 timely written request . . . for review” of a violation, the
4 Department “does not revoke the permit or remove the Display
5 *until* . . . a final decision is issued.” 4 C.C.R. § 2424 (West
6 2002, West 2003). This regulation does provide for a pre-
7 deprivation review of the permit. However, as plaintiff argues,
8 the remedy still results in exposure to monetary, civil, and
9 criminal penalties. Section 2424 of California Code of
10 regulations provides that non-payment penalties include a
11 “mandatory penalty” of \$100 per permit if payment is late. 4
12 C.C.R. § 2424 (West 2006). The permit may also be revoked, the
13 permit holder’s license may be revoked, the sign may be removed,
14 and there are potential misdemeanor penalties. 4 C.C.R. §§ 2442-
15 43; Cal. Bus. & Prof. Code §§ 5463-64. Where the sanctions for
16 failure to comply are merely prolonged by the pre-deprivation
17 hearing, as indicated by the language “until” in § 2442, such a
18 pre-deprivation remedy is meaningless. See McKesson Corp. v.
19 Div. of Alcoholic Beverages & Tobacco, Etc., 496 U.S. 18, 38-39
20 (1990).

21 In McKesson, the Court stated that a meaningful pre-
22 deprivation remedy requires not only a fair opportunity to
23 challenge the accuracy and legal validity of the obligation, but
24 also a clear and certain remedy for any erroneous or unlawful
25 collection of money. Id. at 38. The court also acknowledged
26 that it has long held that “when a tax is paid in order to avoid

27 ⁷ Section 2424(b) was subsequently amended and the new
28 regulatory language became operative on Dec. 23, 2004.

1 financial sanctions or a seizure of . . . property, the tax is
2 paid under 'duress' in the sense that the State has not provided
3 a fair and meaningful pre-deprivation procedure. Id. at 39 n.20.

4 Because the pre-deprivation procedure requires plaintiffs to
5 expose themselves to penalties, sanctions, and a threat of
6 seizure of personal property, the procedure is not meaningful.
7 Therefore, the existence of this remedy does not render
8 plaintiffs' payment of the fees voluntary. Plaintiffs' payments
9 were motivated by the fear of infliction of the penalties. See
10 Flynn, 18 Ca. 2d at 216-17. As such, plaintiffs are entitled to
11 a refund of the fees paid to defendants.

12 **2. California Tort Claims Act**

13 Defendants argue that if the court finds that plaintiffs are
14 entitled to a refund of fees paid, not all plaintiffs have a
15 valid claim for a refund. Defendants contend that many of the
16 plaintiffs did not file a claim with the Victim Compensation and
17 Government Claims Board as required by the California Tort Claims
18 Act ("CTCA"). Therefore, defendants assert that these plaintiffs
19 cannot seek a refund.

20 The CTCA requires that any party seeking "money or damages"
21 from the State file a claim with the appropriate government
22 entity. Cal. Code § 905 (West 2005). However, California courts
23 have held that "the language of section 905 makes clear that the
24 requirements for presentation of claims apply only to 'claims for
25 money or damages' and not to claims for other forms of relief,
26 such as specific recovery of property." Minsky v. City of Los
27 Angeles, 11 Cal. 3d 113, 117 (1974). In Minsky, the California
28 Supreme Court held that in a suit for recovery of sums seized and

1 allegedly wrongfully withheld from the plaintiff, failure to file
2 a claim with the government entity did not bar the action because
3 it was not a suit for "money or damages." Id. at 122. Further,
4 California courts have held that claims brought under the
5 doctrine of unjust enrichment do not require filing of a claim
6 with a government entity. Gonzales v. State of California, 68
7 Cal. App. 3d 621 (1977).

8 Plaintiffs seek a refund of fees paid pursuant to an illegal
9 fee. Their claim for a refund is for return of specific funds
10 that defendants collected without proper legal authority. As
11 such, plaintiffs' claim is for restitution and has its foundation
12 in the doctrine of unjust enrichment. See Gonzales, 68 Cal. App.
13 3d at 627-28. Therefore, plaintiffs have not brought a claim
14 seeking "money or damages" and non-compliance with the claims
15 statutes erects no bar to the instant action.

16 **3. Amount of Refund**

17 Plaintiffs seek a refund of \$72 per permit, which reflects
18 the increase in the fee from the former \$20 fee set pursuant to
19 statute to the \$92 fee which failed to comply with APA
20 procedures. Plaintiffs also seek prejudgment interest of seven
21 percent pursuant to Article XV, Section 1 of the California
22 Constitution. Because the court has found that a refund is due
23 to each plaintiff, the court directs defendants to refund to each
24 plaintiff \$72 per permit for each permit issued between 2003 and
25 2005, when the fee was set without compliance with APA
26
27
28

procedures.⁸ The court also directs defendants to include 7% prejudgment interest in the refund paid to each plaintiff.

D. Attorneys' Fees

Plaintiffs also bring a motion for attorneys' fees, arguing that they are prevailing parties pursuant to 42 U.S.C. § 1988. Section 1988 provides:

In any action or proceeding to enforce a provision of . . . 42 U.S.C. § 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (West 2006). Defendants argue that plaintiffs should not be able to recover attorneys' fees because (1) plaintiffs are not the prevailing party for purposes of § 1988; (2) plaintiffs' APA claim and § 1983 claim do not arise from a common nucleus of operative facts; and (3) plaintiffs' § 1983 claim is not a substantial claim. Defendants also argue that the amount claim is not supported by the documentation provided by plaintiffs. The court will address each argument in turn.

1. Prevailing Party

The Supreme Court held that "[i]f the plaintiffs has succeeded on any significant issue in the litigation which achieved some benefit the parties sought in bringing the lawsuit, the plaintiff has crossed the threshold to a fee award of some kind." Texas State Teachers Assn. v. Garland Independent School

⁸ The parties do not dispute the amount paid in total by each plaintiff. (RUF ¶¶ 8-9, 11-14, 16-21). At the February 10 hearing, the parties stipulated to the amounts paid by three of the plaintiffs which were disputed in the parties' submissions. The parties agreed that plaintiff Viacom Outdoor, Inc. paid defendants \$858,388, plaintiff Clear Channel Outdoor, Inc. paid defendants \$429,544, and plaintiff Acturus Outdoor Advertising, Inc. paid defendants \$7,464.

1 District, 489 U.S. 782, 791-92 (1989). The plaintiff seeking
2 fees must obtain an enforceable judgment against the defendant
3 from whom fees are sought. Gerling Global Reinsurance Corp. of
4 Am. v. Garamendi, 400 F.3d 803, 806 (9th Cir. 2005) (citing
5 Hewitt v. Helms, 482, U.S. 755, 760 (1987)). In other words, a
6 plaintiff is a prevailing party for purposes of § 1988 "when
7 actual relief on the merits of his claim materially alters the
8 legal relationship between the parties by modifying the
9 defendant's behavior in a way that directly benefits the
10 plaintiff." Id. (quoting Farrar v. Hobby, 506 U.S. 103, 111-12
11 (1992)).

12 Defendants argue that plaintiffs are not prevailing parties
13 because the legal relationship between plaintiffs and defendants
14 has not changed and any issue upon which plaintiffs prevailed is
15 *de minimis*. These arguments are without merit. Plaintiffs have
16 prevailed on their claim that the fee set and collected by
17 defendant is invalid for failure to comply with the APA.
18 Plaintiffs have been granted declaratory relief and injunctive
19 relief, preventing defendants from enforcing the invalid
20 regulation or penalizing plaintiffs for non-payment. This relief
21 directly benefits plaintiffs because it prevents defendants'
22 ongoing collection of an invalid fee. Plaintiffs have also been
23 granted a refund of the fees collected by defendants pursuant to
24 the void regulation.

25 Defendants assert that the relationship between plaintiffs
26 and defendants has not changed because, in the future, defendants
27 will impose a fee pursuant to APA procedures and will administer
28 its imposition and collection. However, the legal relationship

1 between plaintiffs and defendants has changed because defendants
2 are required to follow APA procedures in imposing the fee.
3 Further, defendants are enjoined from imposing the invalid fee
4 upon plaintiffs as they had done between 2003-2005.

5 Defendants also assert that plaintiffs prevailed on a purely
6 procedural matter, and therefore the issue prevailed upon was
7 only *de minimis*. See Texas State Teachers Assn, 489 U.S. at 792
8 (stating that where a plaintiff prevails on a purely technical or
9 *de minimis* issue, the "generous formulation" for a prevailing
10 party may not be met). While compliance with the APA is a
11 procedural matter, plaintiffs prevailed by invalidating the fee
12 because defendants failed to comply with the procedural
13 requirements of the APA. The invalidation of the fee was the
14 core of plaintiffs' claim for relief. This invalidation rendered
15 declaratory relief, injunctive relief, and payment of refunds in
16 favor of plaintiffs. As such, plaintiffs prevailed on more than
17 a *de minimis* matter, and are prevailing parties for the purposes
18 of § 1988.

19 **2. Common Nucleus of Operative Facts**

20 Plaintiffs prevailed on their APA claim, not on the § 1983
21 claim for violation of the First Amendment. In the August 29,
22 2005 order, the court did not reach the First Amendment issue
23 because the fee was invalidated on adequate state law grounds.
24 In drafting § 1988, "Congress was not limited to awarding fees
25 only when a constitutional or civil rights claim is actually
26 decided." Maher v. Gagne, 448 U.S. 122, 132 (1980). Rather, §
27 1988 fees may be awarded " in a case in which the plaintiff
28 prevails on a wholly statutory, non-civil-rights claims pendant

1 to a substantial constitutional claim." Id.

2 Such a fee award furthers the Congressional goal of
3 encouraging suits to vindicate constitutional rights
4 without undermining the longstanding judicial policy of
avoiding unnecessary decision of important
constitutional issues.

5 Id. at 133.

6 In order to collect fees in a case where the court declines
7 to enter judgment for the plaintiff on a claim supporting
8 attorneys' fees, plaintiff must prevail on a non-fee claim that
9 arises out of a "common nucleus of operative fact[s]."

10 Garamendi, 400 F.3d at 808 (citing United Mine Workers v. Gibbs,
11 383 U.S. 715, 725 (1966)). Claims arise from a common nucleus of
12 operative facts where fee-supporting claims are so interrelated
13 with non-fee claims that plaintiffs would ordinarily be expected
14 to try them all in one judicial proceeding. Id. (internal
15 quotations omitted).

16 All of plaintiffs' claims arose from defendants' collection
17 of permit renewal fees pursuant to an invalid fee setting
18 regulation. Each of plaintiffs' claims sought to invalidate the
19 fee rate set by defendants, either for procedural or substantive
20 defects. Plaintiffs correctly brought all of these claims in one
21 action. Therefore, the non-fee claim challenging the
22 regulation's validity for failure to comply with APA procedure
23 should have been brought and was brought with the fee claim
24 challenging the regulation's validity for violation of the First
25 Amendment. See Garamendi, 400 F.3d at 809. As such, the non-fee
26 claim arose out of the common nucleus of operative facts
27 implicated in the § 1983 claim.

28 /////

1 Defendants argument that the § 1983 claim and the APA claim
2 do not arise out of a common nucleus of operative facts is based
3 primarily on the fact that there are two different legal theories
4 implicated by plaintiffs' fee-claim and non-fee claim.
5 Defendants emphasize that plaintiffs prevailed on a non-
6 constitutional theory of recovery, not a constitutional theory.
7 However, the common nucleus test requires only similar facts, not
8 similar legal theories. Further, the Supreme Court has
9 explicitly held that § 1988 fees may be awarded to a plaintiff
10 who "prevails on a wholly statutory, non-civil-rights claims
11 pendant to a substantial constitutional claim." Mahe, 448 U.S.
12 at 132. Thus, defendants' arguments are without merit.
13 Plaintiffs' First Amendment claim and APA claim arise out of a
14 common nucleus of operative facts.

15 **3. Substantial First Amendment Claim**

16 A plaintiff seeking to collect § 1988 fees on a non-fee
17 claim must also demonstrate that the constitutional claim is
18 substantial. See Mahe, 448 U.S. at 132 n.15; Garamendi, 400
19 F.3d at 808. "A claim is constitutionally insubstantial if it is
20 'essentially fictitious . . . wholly insubstantial . . .
21 obviously frivolous . . . or obviously without merit."
22 Garamendi, 400 F.3d at 808 (quoting Hagans v. Lavine, 415 U.S.
23 528, 537-38 (1974)). Constitutional claims are substantial for
24 the purposes of attorneys' fees if they are sufficiently
25 substantial to support federal jurisdiction. See Hagans, 415
26 U.S. 528. Application of the Hagans substantiality test does not
27 require the court to determine whether the constitutional claims
28 have merit.

1 Plaintiffs' § 1983 claim does not fail the Hagans
2 substantiality test. Plaintiffs' claim is not so wholly or
3 obviously fictitious, frivolous, or without merit as to deprive
4 the court of federal jurisdiction. Hagans, 415 U.S. at 537-38.
5 In this case, defendants removed this case to federal court on
6 the basis of plaintiffs' § 1983 claim.⁹ The § 1983 claim
7 remained in this action until the court granted plaintiffs'
8 motion for summary judgement and the entire dispute was settled.
9 See Maher, 448 U.S. at 131 ("[T]he constitutional issues remained
10 in the case until the entire dispute was settled by the entry of
11 a consent decree."). Therefore, because plaintiffs'
12 constitutional claims are sufficiently substantial to support
13 federal jurisdiction, plaintiffs have met the substantiality
14 requirement to recover fees pursuant to § 1988.

15 **4. Amount of Attorneys' Fees**

16 Plaintiffs seek attorneys' fees in the amount of
17 \$347,661.50. Defendants argue that this amount is not supported
18 by plaintiffs' documentation and that the amount claimed is not
19 reasonable.

20 In determining a reasonable attorneys' fee, courts employ
21 what is known as the "lodestar" method. See Morales v. City of
22 San Rafael, 96 F.3d 359, 363-65 & nn. 8-12 (9th Cir. 1996). The
23 "lodestar" is calculated by multiplying the number of hours the
24 prevailing party reasonably expended on the litigation by a
25 reasonable hourly rate. McGrath v. County of Nevada, 67 F.3d

26
27 ⁹ While not dispositive of this issue, it is somewhat
28 troubling to the court that defendants removed the case to
federal court on what it now argues is "insubstantial."

248, 252 (9th Cir. 1995). After computing the lodestar figure, the district court assesses whether it is necessary to adjust the amount on the basis of any of the twelve Kerr factors which were not already taken into account. Id.; Kerr v. Screen Guild Extras, Inc., 526 F.2d 67, 70 (9th Cir. 1975); Cunningham v. County of Los Angeles, 879 F.2d 481, 487 (9th Cir. 1988). There is a strong presumption that the lodestar figure represents a reasonable fee and "[o]nly in rare instances should the lodestar figure be adjusted on the basis of other considerations." See Harris v. Marhoefer, 24 F.3d 16, 18 (1994); Oviatt v. Pearce, 954 F.2d 1470, 1482 (9th Cir. 1992).

While determining the lodestar often is difficult and imprecise, the court should provide some indication of how it arrived at its conclusions. See Domingo v. New England Fish Co., 727 F.2d 1429, 1447 (9th Cir.), *modified*, 742 F.2d 520 (9th Cir. 1984); see also Hensley v. Eckerhart, 461 U.S. 424, 437 (1983) (while the district court has discretion in awarding fees, the court must provide "a concise but clear explanation of its reasons for the fee award").

a. Reasonable Hours Expended

In determining the reasonable hours expended, the party seeking attorneys' fees bears the burden of submitting detailed time records which justify the hours spent working on the claims. Id. at 434 (district court should exclude hours not "reasonably expended"). "Where the documentation of hours is inadequate, the district court may reduce the award accordingly." Id. at 433; Chalmers v. City of Los Angeles, 796 F.2d 1205, 1210 (9th Cir. 1986). Here, plaintiffs provided detailed time sheets attached

1 to Terri Walter's declaration filed with this court on December
2 28, 2005.

3 In opposition, defendants contend that the number of hours
4 expended is unreasonable. Plaintiffs seek fees of nearly
5 \$350,000.00. While the large amount of fees in this case can be
6 attributed in part to complex administrative and constitutional
7 issues, it does not justify the award sought by plaintiffs.
8 Accordingly, the court has reduced plaintiffs' hours to reflect
9 only those hours which the court finds were reasonable. See
10 infra section II(c).

11 **b. Reasonable Hourly Rate**

12 In order to decide what rate is "reasonable," courts look at
13 "prevailing market rates in the relevant community." Blum, 465
14 U.S. at 895; Davis v. City of San Francisco, 976 F.2d 1536, 1545
15 (9th Cir. 1992) (a reasonable hourly rate should be determined "by
16 reference to the fees that private attorneys of an ability and
17 reputation comparable to that of prevailing counsel charge their
18 paying clients for legal work of similar complexity").
19 Determination of a reasonable hourly rate is not made merely by
20 reference to rates actually charged by the prevailing party or
21 rates charged in the prevailing party's locale. See White v.
22 City of Richmond, 713 F.2d 458, 461 (9th Cir. 1983). Rather, the
23 rate assessed is based on the prevailing rate in the relevant
24 community *for similar work*. Chalmers, 796 F.2d at 1211; Blum,
25 465 U.S. at 895 n. 11. Generally, the relevant community is the
26 forum in which the district court sits. Davis v. Mason County,
27 927 F.2d 1473, 1488 (9th Cir. 1991). However, rates outside the
28 forum may be used "if local counsel was unavailable, either

1 because they are unwilling or unable to perform because they lack
2 the degree of experience, expertise, or specialization required
3 to handle properly the case." Gates v. Deukmejian, 987 F.2d
4 1392, 1405 (9th Cir. 1992).

5 Plaintiffs' calculation of attorneys' fees uses the
6 "reasonable rate" for partners, associates, and paralegals in
7 Southern California, where the attorneys' law firm is located.
8 Plaintiffs have not established that this action required unique
9 expertise that could not be obtained locally. Thus, the court
10 will not assess the prevailing rates of the Los Angeles and
11 Orange County area.

12 The court finds that reasonable hourly rates are as follows:
13 \$300 per hour billed by a partner; \$225 per hour billed by an
14 associate; and \$90 per hour billed by a paralegal or legal
15 assistant. These figures represent the prevailing rates for
16 similar work in the relevant community of Sacramento in the
17 Eastern District of California, which is the venue of this
18 action.

19 **c. Determining the "lodestar"**

20 The reasonable hours expended by each attorney defending the
21 claim and the corresponding reasonable hourly rates are set forth
22 below. The court excluded hours allocated to duplicative
23 research, communication, or discovery work, excessive billing, or
24 which were otherwise unwarranted. In this regard, based upon the
25 court's review of the breadth and complexity of the issues
26 involved in this litigation and upon the court's experience with
27 the parties and the submissions by the parties in this case, the
28 court has made the following findings regarding the reasonable

number of hours expended by plaintiffs on each component of the litigation:

<u>Project</u>	<u>Submitted Hours</u>	<u>Reasonable Hours</u>
Pre-lawsuit Work	42.9	NONE
Pleadings & Removal	29.45	29.45
First Amendment Research & Analysis	74	50
OAA Research & Analysis	29.75	15
APA Research & Analysis	117.1	50
Case Administration & Procedural Issues	75.4	25
Misc. Legal Research & Analysis	122.1	55
Client Communication	74.75	25
Communication with Defendants	20.9	10
Discovery	47.95	20
Motion for Partial Summary Judgment	228.1	150
Motion for Summary Judgment	213.55	125
Motion for Fees	128	50

The court calculated the time spent on each project by each attorney or paralegal and adjusted the number of hours performed by each attorney and paralegal, using the same ratio.

After adjusting the hours to take these considerations into account, the total amount of the attorneys' fees is

\$164,203.80.¹⁰ The following is a breakdown of this determination:

<u>Attorney/ Paralegal/</u>	<u>Hours</u>	<u>Rate</u>	<u>Total</u>
MFW	453.14	\$300	\$135,942
AT	108.77	\$225	\$24,473.25
AH	0.93	\$225	\$209.25
TW	38.67	\$90	\$3,480.30
LB	1.1	\$90	\$99
Total = \$ 164,203.80			

d. Kerr Factors

In Kerr v. Screen Guild Extras, Inc., 526 F.2d 67, 70 (9th Cir. 1975), the Ninth Circuit outlined twelve factors the court should evaluate in determining whether to adjust the Lodestar: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. Id.

/////

¹⁰ Defendants have not asserted an inability to pay the requested attorneys' fee or suggested that an award of fees would be a hardship.

1 After evaluating the Kerr factors, the court finds that
2 plaintiffs' attorneys' fee should not be adjusted. Accordingly,
3 the court finds that plaintiffs'* attorneys fee are properly
4 calculated at \$ 164,203.80.

5 **CONCLUSION**

6 For the foregoing reasons, plaintiffs' motion for summary
7 judgment is GRANTED and plaintiffs' motion for attorneys' fees is
8 GRANTED.

9 IT IS SO ORDERED.

10 DATED: March 15, 2006

11 /s/ Frank C. Damrell Jr.
12 FRANK C. DAMRELL, Jr.
13 UNITED STATES DISTRICT JUDGE
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28